STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2009
v	No. 283852 Oakland Circuit Court
BRYAN DAVID THOMAS, Defendant-Appellant.	LC No. 2007-217605-FC

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and three counts of stealing or retaining a financial transaction device, MCL 750.157n(1). Defendant was sentenced to 7 to 20 years' imprisonment for the armed robbery conviction, and one to four years' imprisonment for each of the stealing or retaining a financial transaction device convictions. We affirm.

Defendant first argues that the trial court erred by denying his motion for disqualification because the trial court was personally biased against defense counsel. We disagree. In order to preserve a judicial disqualification issue for appellate review, a defendant must first move for disqualification before the challenged judge and, if the motion is denied, request referral to the chief judge of the circuit court for review of the motion de novo. MCR 2.003(C)(3)(a); *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Because defendant failed to seek review of the denial of his motion for disqualification by the chief judge of the circuit court, defendant has not preserved this issue for review. *Id*. Therefore, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCR 2.003(B)(1) provides that "a judge is disqualified when the judge cannot impartially hear a case" including when a "judge is personally biased or prejudiced for or against a party or attorney[.]" A party who challenges a judge for personal bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). In general, the challenger must prove that the judge harbors actual bias in favor of or prejudice against either a party or a party's attorney that is both personal and extrajudicial. *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). The opinions formed by a judge based on facts introduced or events that occurred during the proceedings do not constitute bias or prejudice unless the judge exhibits deep-seated favoritism or antagonism that makes the exercise of fair judgment impossible. *Cain*,

supra at 496. Additionally, critical comments directed to a party or to a party's attorney ordinarily do not support a finding of bias or prejudice, *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999), nor do expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display, *Cain*, *supra* at 497, n 30.

Defendant's basis for his motion for disqualification was comments made by the trial court about defense counsel in a prior civil matter where the trial court allegedly impugned the honesty and integrity and expressed disdain for defense counsel. However, defendant has not revealed the substance of these comments beyond this description. He has not offered a transcript of the statements or provided any record evidence of the statements. These allegations, even if taken as true, do not overcome the heavy presumption of judicial impartiality. Defendant has failed to make a showing that these comments reflect actual bias or prejudice on the part of the trial court. Again, "comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *Wells*, *supra* at 391. Although the relationship between defense counsel and the trial court may be strained, there is nothing in the record that shows a deep-seated favoritism or antagonism. *Wells*, *supra* at 391.

Defendant also contends that the trial court's rulings prohibiting codefendant Kristopher Konicki's out of court statements from being introduced into evidence, as well as it warning defense counsel about trying to get this evidence admitted, showed the trial court's prejudice against defense counsel.[1] Although the trial court ruled these statements were inadmissible, defendant, as analyzed below, cannot show this ruling was in error. The transcript indicates that after a brief colloquy defendant failed to make an offer of proof upon which this court could rely to make an analysis. Furthermore, after repeated attempts by defense counsel to elicit testimony about Konicki's statements, the trial court explicitly warning defense counsel not to attempt to get the evidence admitted. This Court has found that "repeated rulings against a litigant do not require disqualification of a judge." *People v Fox*, 232 Mich App 541, 558; 591 NW2d 384 (1998). Moreover, the trial court giving a warning to defense counsel not to continue to attempt to elicit hearsay testimony did not exceed the expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women sometimes display. *Cain*, *supra* at 497 n 30. Because defendant has failed to show that the trial court's comments, opinions and adverse rulings were evidence of "a deep-seated favoritism or antagonism," defendant has failed to show judicial bias. *Wells*, *supra* at 391.

Defendant also argues that the trial court's denial of his motion to disqualify denied him his constitutional right to a fair trial. We disagree. A judge may be disqualified without a showing of actual bias "where experience teaches us that the probability of actual bias . . . is too high to be constitutionally tolerable." *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975) (internal quotations and citations omitted); see also *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). Among the situations presenting such a risk are: (1) where the trial judge "has a pecuniary interest in the outcome," (2) where the judge "has been the target of personal abuse or criticism from the party before him," (3) where the judge is

[1] Konicki pleaded guilty before trial.

"enmeshed in [other] matters involving petitioner," and (4) where the judge may have "prejudged the case because of prior participation." *Crampton*, *supra* at 351; *Kloian*, *supra* at 244-245. However, "disqualification for bias or prejudice is only constitutionally required in the most extreme cases." *Cain*, *supra* at 498.

Defendant's allegations regarding the trial court's personal view of defense counsel do not rise to the level of a constitutional violation. This is apparent from the examples set forth in *Crampton*. As analyzed above, defendant failed to show even personal prejudice or bias. Furthermore, nothing defendant has alleged about the trial court's prior dealings with defense counsel suggests the sort of conflict of interest indicated by the above examples that would create a high enough probability of actual bias to make it constitutionally intolerable. Therefore, defendant has not established plain error.

Next, defendant argues that the trial court erred by ruling that Konicki's statements were inadmissible hearsay. Defendant contends that the excited utterance and present sense impression hearsay were the applicable exceptions under which to admit the statements. We disagree.

A party whose proffered evidence is excluded at trial must make an offer of proof to preserve the issue of admissibility of the evidence for appeal unless the substance of the evidence was apparent from the context in which questions were asked. MRE 103(a)(2); *People v Snyder*, 462 Mich 38, 42; 609 NW2d 831 (2000). Defendant failed to make an offer of proof at trial regarding testimony about alleged statements by Konicki after the victim was robbed. Contrary to defendant's argument, there is no indication that the trial court prohibited defense counsel from making such an offer. Rather, defense counsel did not request to make an offer of proof once the trial court ruled that defense counsel's question was going to elicit inadmissible hearsay testimony. Additionally, the substance of the evidence is not apparent from the context within which the questions were asked. Based on the transcript, there is no way to determine what the substance of the testimony regarding Konicki's statements was going to be. Therefore, because the issue is not preserved, we review for plain error affecting substantial rights. *Carines*, *supra* at 763-764.

The hearsay exception for excited utterances allows admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." MRE 803(2). Sufficient evidence (1) that the startling event actually occurred, and (2) that the declarant was still under the stress of it, must be presented. *People v Barrett*, 480 Mich 125, 133-134; 747 NW2d 797 (2008).

The record does not establish plain error. There is no basis in the record to conclude that Konicki, the declarant, was under the stress of the excitement caused by his involvement. Merely because Konicki engaged in what defendant would characterize as an impromptu criminal act does not show that the robbery constituted a startling event or that Konicki was under the stress of the excitement from this event when he made his statements. Without this foundation, defendant has failed to show plain error.

In regard to the present sense impression exception, a statement describing or explaining an event or condition made while the declarant perceived the event or condition, or immediately thereafter, is also admissible as an exception to the hearsay rule. MRE 803(1). To be admissible

as a present sense impression, a statement must have provided an explanation or description of the perceived event, the declarant must have personally perceived the event, and the explanation or description must have been made substantially contemporaneously with the event. *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998).

Again, defendant has failed to show plain error. Without an offer of proof, it is not clear that Konicki's statements were made contemporaneously with the events. As the prosecution notes, after the robbery of Ives, Konicki called Brandon Radke for a ride. Konicki then went over to Radke's car but turned around and walked away before he went back to the car. He then rode with Radke and picked up defendant. There is not an established timeline in the record regarding how long it took for these events to transpire and then for Konicki and defendant to both get in the car and Konicki to pull out the wallet and make his statements. Without clear evidence that these statements were made substantially contemporaneously with the event, defendant cannot establish plain error.

Defendant also argues that the trial court's decision regarding the admission of Konicki's out of court statements denied him his constitutional right to present a defense. We disagree. Because this argument was not preserved, we review for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

It is a fundamental constitutional right that a defendant has a right to present evidence in his or her own defense. *People v Unger (On Remand)*, 278 Mich App 210, 249; 749 NW2d 272 (2008). This right is, however, not absolute as states "have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures." *Id*. at 250, citing *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Unger*, *supra* at 250 (internal quotations omitted).

Defendant was prohibited from introducing statements made by Konicki after the offense took place. There was nothing to establish the reliability of these hearsay statements and defendant chose not to call Konicki as a witness. Furthermore, the trial court's ruling regarding Konicki's statements, which defendant contends would have shown that defendant did not know the wallet was stolen, did not prevent defendant from presenting a defense. This is because defendant was able to elicit testimony from both Radke and Matt Briske that defendant was surprised after Konicki pulled out the victim's wallet. Therefore, defendant has failed to establish plain error.

Lastly, defendant claims that the trial court improperly instructed the jury by only requiring the jury to find that he possessed or obtained possession of the financial devices rather than steal, take or remove the financial devices. Defendant also contends that the instructions substantially altered his charge under MCL 750.157n(1) and, based on these instructions, he was denied his constitutional right to notice of the charges against him. We disagree.

Generally this Court reviews issues of law arising from jury instructions de novo, but a trial court's decision regarding whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

This Court also reviews jury instructions in their entirety to determine if there is error that requires reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Additionally, "[i]nstructions that are somewhat imperfect are acceptable, as long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999).

Regarding the charge of stealing a financial transaction device, the trial court instructed the jury as follows:

> Members of the Jury, the defendant is charged in Count 2, 3, and 4 with the crimes of taking or stealing or removing or possessing someone else's credit card and/or ATM card and/or account number without that person's consent.
>
> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First the defendant obtained possession of the credit card and/or ATM card and/or account number. Second, that defendant did this knowingly. Third, that the defendant did this without Graham [the victim's] consent. Fourth, that the defendant intended to defraud or cheat someone.

The instructions of the trial court followed the standard jury instructions. See CJI2d 30.3. Also, these instructions were reflective of MCL 750.157n, which provides, in part:

> (1) A person who steals, knowingly takes, or knowingly removes a financial transaction device from the person or possession of a deviceholder, or who knowingly retains, knowingly possesses, knowingly secretes, or knowingly uses a financial transaction device without the consent of the deviceholder, is guilty of a felony.

The jury was instructed regarding each element of stealing or retaining a financial transaction device and was told that the prosecution must prove each element beyond a reasonable doubt. Specifically, the jury was instructed that the prosecution had to prove defendant had knowing possession of the victim's credit cards or ATM card or bank account numbers without the victim's consent and that defendant intended to defraud someone. CJI2d 30.3; MCL 750.157n(1).

Defendant contends that by adding the language to the jury instructions that was not included in the General Information, he was denied his right to fair notice of the charges against him. The Information charged defendant with three counts of violating MCL 750.157n(1), and specifically charged defendant with "stealing," "taking," or "removing," but it did not include the term "possession" or the phrase "obtaining possession." However, the trial court only used the term "possession" when introducing the charge. As part of its instructions, it specifically instructed that *the elements* were what had to be proven beyond a reasonable doubt. When instructing on the elements, the trial court told the jury that defendant must have obtained possession and that this must have been done without the victim's consent. Obtaining possession without consent is tantamount to stealing, removing, or taking. Read as a whole, the jury instructions were proper, *McFall*, *supra* at 412, and the trial court fairly presented to the jury the issues to be tried and sufficiently protect the rights of the defendant, *Perry*, *supra* at 526.

Furthermore, because the use of the phrase "obtained possession" did not substantially alter the offense charged, defendant was not denied his constitutional right to notice of the charges he was facing.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens